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Supreme Court of the United States

[illegible] Term, 19[illegible]

No. [illegible]

The B. F. Goodrich Company, *Petitioner*,

v.

The United States, *Respondent*.

BRIEF FOR THE B. F. GOODRICH COMPANY.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Attorneys for Petitioner.

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CITATIONS.

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 158.

THE B. F. GOODRICH COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF FOR THE B. F. GOODRICH COMPANY.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 285-301) is reported at 135 F. (2) 456. The opinion of the District Court (R. 95-108) is reported at 48 F. Supp. 453.[1]

JURISDICTION.

The judgment of the Circuit Court of Appeals (R. 302) was entered on April 13, 1943. The petition for writ of certiorari was filed on July 13, 1943. This Court has jurisdiction under Section 240 (a) of the Judicial Code

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[1]The District Court's findings of fact (R. 140-150) and conclusions of law (153-161) are not reported.

(as amended by the Act of February 13, 1925) and 28 U. S. C. §350.

STATUTES INVOLVED.

The pertinent parts of the statutes involved are set forth in the Appendix, infra, pp. 25-26.

STATEMENT.

The questions presented by the case arise from the holding of the Circuit Court of Appeals that there was a fatal variance between petitioner's First Amended Petition, upon which the suit for recovery of taxes was tried in the District Court, and the claims for refund of taxes which petitioner submitted to the Commissioner of Internal Revenue. In so far as they bear on these questions, the facts, pleadings, proceedings on trial, and decisions of the courts below may be summarized as follows:

1. FACTS.[2] From August 1, 1933 to January 5, 1934, Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner (R. 82, 142), manufactured and sold tires containing 705,806 pounds of processed cotton on which it paid to the Collector of Internal Revenue the "floor tax" provided for by Section 16 (a) of the Agricultural Adjustment Act of 1933, 48 Stat. 40, U. S. C. §616 (a)[3] (R. 86-87, 143-154). In computing the manufacturer's excise tax imposed upon these tires by Section 602 (1) of the Revenue Act of 1932, 47 Stat. 261, 26 U. S. C. §3400,[4] Pacific Goodrich Company (hereafter referred to as "Pacific") deducted from the gross weight of such tires the 705,806 pounds of processed cotton on which it had paid the "floor stock" tax (cf. R. 87-88 with R. 145). In making this deduction against the excise tax, Pacific relied upon

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[2]The facts and certain of the exhibits were stipulated (R. 80-92, 159-160).

[3]See p. 26, *infra*.

[4]See p. 25, *infra*.

proviso of Section 9 (a) of the Agricultural Adjustment Act, 48 Stat. 35, 7 U. S. C. §609 (a)[5] (R. 148, 90-91).

The Collector of Internal Revenue (John B. Carter[6]) on April 10, 1934, disallowed Pacific's deduction of the weight of the processed cotton from the gross weight of the tires in computing the excise tax, and demanded, as an additional excise tax, the sum of $15,880.64, which was arrived at by applying the rate of the excise tax to the weight of the processed cotton deducted by Pacific in its computation of the tax. In addition, a penalty of $569.74 was assessed (R. 88, 146, 93-94, 196-197). Pacific paid the additional assessment[7] and the penalty, which together totalled $16,450.39, in April and July, 1934 (R. 146-147). No part of the additional tax or penalty has been refunded either to Pacific or to petitioner (R. 150).

At the close of business on June 30, 1934, Pacific delivered possession of all of its assets to the petitioner as sole owner of Pacific's stock (R. 147, 93-94, 225, 227). At the same time Pacific, by its President and Secretary executed an instrument by which it assigned, transferred, and set over "to The B. F. Goodrich Company . . . all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have . . ." (R. 83, 148, 52, 93, 191-193). This

[5]The proviso reads as follows: "Provided, that upon any article upon which a manufacturer's sales tax is levied under the authority of the Revenue Act of 1932, and which manufacturer's sales tax is computed on the basis of weight, such . . . sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a *processing* tax has been paid." (Italics supplied.)

[6]Mr. Carter died prior to the commencement of the action (R. 80, 1942), which, therefore, was brought against the United States.

[7]It was stipulated (R. 257) that the additional excise tax, though demanded of and paid by the Pacific, was never formally assessed against it. However, for convenience' sake we shall refer to the tax as an assessment.

instrument was ratified by Pacific's Board of Directors and stockholders on July 6, 1934 "as a distribution in kind of all of the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by The B. F. Goodrich Company . . ." (R. 147, 93-94, 225, 227, 230). At the same time the stockholders directed the officers of the corporation to convey to petitioner all of Pacific's real estate (R. 147, 93-94, 225, 230-231), and to take the measures necessary to dissolve the corporation (*ibid*). Pursuant to the latter direction Pacific was dissolved on December 21, 1934 (R. 81, 141, 93-94, 233-235).

On August 31, 1935, Pacific and petitioner each submitted a claim for refund of the additional manufacturer's excise tax which had been collected from Pacific (see p. 3, *supra*). Both of these claims were predicated on the ground that Pacific in computing the excise tax on the tires which it sold was entitled under the proviso of Section 9 (a) of the Agricultural Adjustment Act, *supra*, to deduct from the gross weight of the processed cotton contained therein on which it had paid a "floor stock" tax under Section 16 (a) of that Act, *supra* (R. 89, 148, 93-94, 199-202, 209-214). In addition, petitioner stated in its claim that it was entitled to the refund by virtue of the assignment made to it by Pacific on June 30, 1934 (R. 148-149, 93-94, 211-213).

On April 21, 1936, both Pacific and petitioner filed amended claims which differed from the original claims only in the additional statement that Pacific had not included the taxes in the prices of the tires on which the taxes had been assessed[8] (R. 90, 149, 93-94, 203-208, 215-220). In both of their original and amended claims, petitioner and Pacific gave their address as 5400 E. Ninth Street.

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[8]The additional assessment having been paid on April 19, 1934 (cf. R. 146 with R. 202), the bar of the statute of limitations against claims for refunds (Section 1106 (a) of the Revenue Act of 1932, 47 Stat. 287, now 26 U. S. C. § 3313) fell on April 19, 1938.

Los Angeles, California (R. 199, 204, 209, 215), and petitioner's original claim as well as both of Pacific's claims were submitted by S. M. Jett as Secretary of the respective corporations (R. 201, 207, 213).

The Commissioner of Internal Revenue on April 18, 1936 rejected Pacific's original claim on the ground that Section 9 (a) of the Agricultural Adjustment Act, *supra*, did not authorize a deduction of the weight of processed cotton on which a "floor stock" tax had been paid under Section 16 (a) of that Act, *supra*, in the computation of the excise tax imposed on tires by Section 602 (a) of the Revenue Act of 1932, *supra*.[9] On May 22, 1936, the Commissioner, by letter, rejected Pacific's amended claim of April 21, 1936, for the same reason and for the additional reason that the amended claim failed to set forth any new and material evidence (R. 150, 93-94, 220-221, 223-224). On the same date, the Commissioner, by a letter sent to petitioner "as successor to Pacific Goodrich Company" (R. 90[10]), rejected petitioner's original and amended claims (R. 149-150, 93-94, 221-222). The material part of this letter reads as follows:

> "It is stated [in petitioner's claims] that you are entitled to the refund . . . since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Company erroneously paid manufacturer's excise tax in the amount claimed for the reason that the floor tax was paid on the cotton content of the tires in question.
>
> "There is on file in this office a claim filed by Pacific Goodrich Rubber Company for refund of the above

[9]The Commissioner reasoned that the words "processing tax" used in the proviso (see n. 5, p. 3, *supra*) did not include within their scope the "floor stock" tax imposed by Section 16 (a) (R. 223-224).

[10]The letter of rejection is referred to in the stipulation as "plaintiff's Exhibit 'F'." However, as introduced, the letter is marked "Plaintiff's Exhibit H" (cf. R. 160 with R. 221-222).

tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full." (R. 222.)

2. PLEADINGS AND TRIAL. On October 1, 1937, petitioner filed in the District Court its original petition (R. 2-25) for recovery of the additional excise tax collected from Pacific. This petition alleged (R. 3-5) that on June 30, 1934, petitioner had become the owner, by assignment, of "all the rights, claims and choses in action" which Pacific had at that time. In support of this allegation, Pacific's assignment of the same date was set forth[11] (R. 3-5). The petition further alleged that the action instituted was one for the recovery of the manufacturer's excise tax erroneously collected from Pacific and asked that judgment for recovery of the tax be entered against respondent (R. 6-25).

Respondent on December 3, 1937, met the petition with a demurrer which, on the assumption that the petition sought recovery of taxes paid under the Agricultural Adjustment Act, challenged the jurisdiction of the District Court under Sections 905 and 906 of the Revenue Act of 1936[12] and the sufficiency of the petition under the Sections 902, 903, and 904 of the same Act[13] (R. 28-31). On April 6, 1938, the Government amended its demurrer by adding a third ground which challenged, under R. S. §3477, 31 U. S. C. § 203 (see p. 25, *infra*), the validity of Pacific's assignment of June 30, 1934 (R. 33-34).

The District Court on October 3, 1938, overruled the demurrer (R. 40-41), and respondent on February 3, 1939, filed its answer (R. 41-48). In its first answer and defense, respondent denied (R. 42-45) the petitioner's allegation that the suit was brought for the recovery of the manufacturer's excise tax and all petitioner's allegations going

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[11]See p. 3, *supra*.

[12]49 Stat. 1748, 7 U. S. C. §§ 647 and 648.

[13]49 Stat. 1747, 7 U. S. C. §§ 644, 645 and 646.

o the illegality of the tax assessed against Pacific. In its econd answer and defense that the suit was one for recovry of taxes paid under the Agricultural Adjustment Act nd that petitioner was not entitled to recovery since either it nor Pacific had complied with the provisions of he Revenue Act of 1936 governing claims for refunds of axes paid under the former Acts.[14] At no point in the nswer was it alleged that there was a variance between he claim for refund and the petition as amended.

Thereafter, on February 5, 1940, petitioner filed its First mended Petition (R. 50-78) which, so far as here material, iffered from the original petition and its amendment only n alleging that petitioner, as the sole shareholder of Pacific, ecame entitled on June 30, 1934, "to all rights, claims and hoses in action" possessed by Pacific on that date "by peration of law, pursuant to a distribution in kind to it y Pacific" at that time (R. 51). Pacific's assignent of June 30, 1934, was set out at length "as hysical evidence, affirmative proof and confirmation" f this allegation (R. 51-56). Prior to the filing of this First Amended Petition", the parties stipulated that the riginal petition as amended might be "amended in the articulars as set forth in [petitioner's] First Amended 'etition" and that respondent's answer to the original etitioner's amendment "shall in all particulars be deemed o be an answer to [petitioner's] First Amended Petition n all particulars and with the same . . . effect . . . as though aid answer was specific and particular answer to said 'irst Amended Petition" (R. 78-79).

The trial (R. 185-262) consisted of little more than the ubmission (R. 189-190) of the Stipulation of Facts and the ntroduction of exhibits in evidence. However, in their pening statement, counsel for petitioner and respondent tated their views of the nature of the suit before the Court

[14]Respondent also set out as an affirmative defense that no efund could be had under the Agricultural Adjustment Act ecause that Act had been declared unconstitutional (R. 48).

and issues arising therein. According to counsel for petitioner (R. 187-188) the suit was one for the recovery of an additional manufacturer's excise tax, and the issue was whether the words "processing tax" as used in the proviso of Section 9 (a) of the Agricultural Adjustment Act (see n. 5, p. 3, *supra*) comprehended the "floor stock" tax imposed by Section 16 (a) of the same Act, *supra*. Counsel for respondent stated (R. 188-189), as to the issue suggested by counsel for petitioner, that it was the contention of respondent that the "floor stock" tax was not a processing tax within the terms of the proviso of Section 9 (a). He stated further that it was the respondent's position that the suit was in fact one for the recovery of taxes paid under the Agricultural Adjustment Act and that the issue was whether petitioner had complied with the statutory and administrative conditions precedent to the maintenance of such a suit. Counsel for respondent did not suggest at any point in the trial that there was a variance in petitioner's claim for refund and petitioner's First Amended Petition.[15]

3. Decision of District Court. The two main questions considered in the decision of the District Court (R. 95-108) were: (1) Whether the additional manufacturer's excise tax was erroneously collected from Pacific. (2) Whether petitioner was entitled to recover the tax collected from Pacific. On the first question the Court concluded that the tax had been erroneously collected (R. 95-101); on the second, that petitioner was not entitled to recover[16] (R. 101-108).

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[15]Nor did the trial brief submitted by respondent raise the question of variance. In fact, respondent conceded in its brief before the Circuit Court of Appeals (p. 26, n. 12) that the question of variance "was not urged by the Government in the court below."

[16]The Court made three subsidiary holdings in support of its main holding on this question: (1) Petitioner's right to the refund depended upon Pacific's assignments of June 30, 1943 and August 14, 1935, which, since Pacific's claim had not been

Before concluding that petitioner could not recover, the District Court, *ex mero motu*, raised and determined (R. 102-103) a question of a variance between petitioner's claims for refunds and its First Amended Petition. On this point, the Court initially stated that the First Amended Petition varied from the claims for refund because in the latter petitioner's right to maintain its suit for the recovery of the taxes was predicated on Pacific's assignment of June 30, 1934, while in the former it was predicated on petitioner's ownership of Pacific's stock in addition to the assignment of June 30, 1934. The Court stated further that the variance was occasioned, not by failure to comply with the statute (R. S. §3226, as amended by Section 1103 (a) of the Revenue Act of 1932, 47 Stat. 286, 26 U. S. C. §3772 (a) (1) (see p. 25, *infra*)) requiring that a claim for refund be submitted to the Commissioner prior to the institution of suit, but by failure to comply with the Treasury Regulation requiring that claims for refund state in detail each ground upon which they are founded together with facts sufficient to apprize the Commissioner of the exact basis of the claim.[17]

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allowed, its amount determined and warrants for its payment issued, were void under R. S. § 3477, *supra* (R. 103-105; cf. Conclusion of Law V, R. 155-156). (2) Petitioner was not, within the terms of Section 621 (d) of the Revenue Act of 1932, 47 Stat. 267, 26 U. S. C. § 3443 (d), governing claims for refunds of manufacturer's excise taxes collected under the Act, "the person who paid the taxes" (R. 106; cf. Conclusion of Law VI, R. 156). (3) Petitioner's evidence did not satisfactorily establish, as required by Section 621 (d), *supra*, that the taxes and suit had not been included in the prices charged for the tires assessed. (R. 107-108; cf. Conclusion of Law VII, R. 156).

[17]The District Court did not cite the Treasury Regulation upon which it relied in raising the question of variance. However, it is obvious that it had in mind T. R. 86, Art. 322-3 promulgated under the Revenue Act of 1934 (now T. R. 101, § 19.322-3) which provided that a claim for refund "must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commis-

The Court also noted that the Commissioner appeared to have rejected petitioner's claim on the "broad ground that no right for refund existed in [petitioner] under the Commissioner's interpretation of Section 9 (a) of the Agricultural Adjustment Act" (R. 103). The Court then held, relying on *Tucker* v. *Alexander*, 275 U. S. 228, that respondent had waived the variance by its failure "to insist at any time upon the literal compliance with the regulations" (R. 103).

4. DECISION OF THE CIRCUIT COURT OF APPEALS. In its decision (R. 285-301), the Circuit Court of Appeals affirmed the judgment of the District Court on the sole ground that petitioner's First Amended Petition varied fatally from its claims for refund.

In reaching its decision, the Circuit Court of Appeals held (R. 295-298) that R. S. §3226, *supra*, required that a claim for refund "identical"[18] with the claim upon which the suit is based be first submitted to the Commissioner

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sioner of the exact basis thereof." This regulation, however, applied to income taxes only. Prior to November 12, 1935 (petitioner's original claim was filed on August 31, 1935) T. R. 46, Art. 71 (promulgated under the Revenue Act of 1932, but not published as a Treasury Decision), provided, in so far as here material, that claims for refunds of excise should contain "the reason for claiming the . . . refund" and establish that the tax was not included in the sales price of the article assessed. On November 12, 1935 (petitioner's amended claim was filed on April 21, 1936) these provisions were removed from the Regulation (see *Shotwell Manufacturing Company* v. *Harrison*, 27 F. Supp. 422 (D. C. N. D. Ill.); T. D. 4605, Cum. Bull. XIV-2, pp. 386-388), and were not restored until August 16, 1938 (see T. D. 4853, Cum. Bull. 1938-2, pp. 383, 387-388). These provisions appear in the present regulations (see 26 C. F. R. (1940 Supp.) § 316.94).

[18]The Court said (R. 297):

"The only logical conclusion that can be drawn from consideration of Section 3226 is that the claim for refund, which must be filed with the Commissioner as a condition precedent to maintain a suit for the recovery of the tax, is the identical claim upon which said suit must be based."

of Internal Revenue as a condition precedent to the maintenance of the suit.[19]

The Court also held (R. 300-301) that respondent did not waive the variance at the trial of the case. On this point it said (R. 300):

> "It is also urged by Goodrich Company that the Government waived the form of the claim in the trial before the District Court. We do not agree. The Government demurred to the complaint on the very basis that the assignment was invalid and that the complaint therefore did not state a cause of action. The demurrer was overruled, and the Government answered the complaint; but in so answering, it did not lose its right to challenge the validity of the assignment, as disclosed by the claim."

QUESTIONS PRESENTED.

1. Does R. S. §3226 require that the facts and grounds relied on in a suit to recover taxes be *identical* with the facts and grounds stated in the claim for refund thereof?

2. If a variance did exist between the facts and grounds relied on in this suit and those stated in the claim for

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[19] In reaching this conclusion the Circuit Court of Appeals relied upon *United States* v. *Felt & Tarrant Manufacturing Company*, 283 U. S. 269, from which the Court quoted (R. 297-298) the following passages:

> "The claim for refund, which Section 1318 [of the Revenue Act of 1921, which was substantially the same as R. S. § 3226] makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the regulation, the statute is not satisfied with the filing of the paper which gives no notice of the amount or nature of the claim for which suit is brought and refers to no facts upon which it may be founded." (283 U. S. at p. 272.)
>
> "Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right'." (283 U. S. at p. 273.)

refund, did the Government waive the variance on the trial of the suit?

3. On the trial of a suit to recover taxes, does the Government have the power to waive a variance, the subject matter of which could have been incorporated in an amendment to a timely claim for refund even though the statute of limitations had run against the filing of an original claim for refund?

SUMMARY OF ARGUMENT.

I.

The claim for refund in this case mentioned the instrument by which a distribution in kind was effectuated, whereas the petition in the suit described the entire transaction. Such "variance" was not fatal. To serve as a condition precedent to a suit to recover taxes, a claim for refund need not set forth with complete identity the facts and grounds sued on. The claim is sufficient, even though it differs in details, if it states the grounds and reasonably apprizes the Commissioner of the facts relied upon, the grounds and facts set forth being in essentials the same as those relied on in the suit.

II.

A variance between a claim for refund and a suit to recover taxes is waived if the Government fails to object to the variance at the trial of the suit to recover taxes.

III.

When a timely claim for refund has been filed, the Commissioner has power to permit and consider a proper amendment even though the statute of limitations against an original claim for refund has run. The variance, if any, in the instant case could have been incorporated in an amendment to the timely claim for refund filed by Petitioner. The waiver of the variance by the Government was

therefore, permissible; for it did not constitute a waiver of the statute of limitations governing the time in which a claim for refund must be filed, but the waiver of the filing of an amended claim before the Commissioner.

ARGUMENT.

I.

The claim for refund was sufficient as a condition precedent to the suit to recover taxes.

Petitioner's claim for refund and its suit to recover the taxes were both predicated on two contentions. The first, or substantive contention, was that the Collector had illegally collected the taxes in question from Pacific. The second, or procedural contention, was that petitioner had become entitled to recover the taxes paid by Pacific. The variance which the Court of Appeals held to be fatal in this case relates only to the procedural contention.

In its claim for refund, petitioner, in support of its right to proceed to recover the taxes paid by Pacific, submitted the following statement:

> "The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter." (R. 211.)

In its First Amended Petition, the allegation which petitioner made in support of its right to maintain a suit to recover the taxes exacted of Pacific reads:

> "That on said 30th day of June, 1934, plaintiff, as the sole shareholder of Pacific Goodrich Rubber Company and as the sole owner of all of the issued and outstanding shares of the capital stock of said Pacific

> Goodrich Rubber Company, became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with the title to all the rights, claims and choses in action of every nature and description, which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or to become due or payable." (R. 51.)

In support of this allegation, the petitioner set out at length the assignment of June 30, 1934 (R. 52-55).

An examination of these allegations shows that the sole operative distinction[20] between the First Amended Petition and the claim for refund is the allegation that the assignment of June 30, 1934, named in the claim for refund, effectuated a distribution in kind of all the assets to petitioner, the sole stockholder of the assignor. This is the variance which the Court below held to be fatal.

In view of the nature of the only difference between the claim for refund and the First Amended Petition, it is obvious that a literal meaning must be given to the Court's holding that the claim on which a suit to recover taxes is grounded must be "identical" with the claim asserted in the claim for refund; that is, the Court must be taken to have held that the suit to recover taxes must accord with the claim for refund, not only in essentials, but also in details. We submit that this holding of the Court below is erroneous in that it ignores the nature of a suit to recover taxes and the function of a claim for refund as a condition precedent to such suit.

Rules Governing the Sufficiency of Claims for Refund.

A suit to recover taxes is not in the nature of a judicial review to determine the correctness of an administrative determination upon scrutiny of a record made before an

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[20]The statement that the distribution in kind resulted in petitioner acquiring ownership of the claim "by operation of law" not only was a conclusion of law, and thus surplusage, but also was unsupported by the facts alleged.

administrative agency. It is an independent suit in which the question of the illegality of the contested tax is determined *de novo*. *Fidelity & Columbia Trust Company* v. *Lucas*, (D. C.) 7 F. (2d) 146, 149-151, cited with approval in *Wickwire* v. *Reinecke*, 275 U. S. 101, 105. However, by virtue of R. S. § 3226, *supra*, the filing with the Commissioner of a claim for a refund of the contested tax is a condition precedent to the prosecution of a suit to recover taxes. *United States* v. *Kales*, 314 U. S. 186, 193; *Savings Institution* v. *Blair*, 116 U. S. 200, 205-206. It is by reference to these two basic rules and to a consideration of the function of a claim for refund that the sufficiency of a claim for refund should be determined.

Since a claim for refund is a condition precedent to a suit to recover taxes, it obviously follows that the claim must give notice of the "facts upon which the suit may be founded". *Felt & Tarrant Manufacturing Company* v. *United States*, 283 U. S. 269, 272. But since the suit to recover taxes is a *de novo* proceeding, evidence not submitted in the claim for refund may be submitted to the Court in support of the suit. *Fidelity & Columbia Trust Company* v. *Lucas, supra; Bethlehem Baking Company* v. *United States*, 129 F. (2) 490, 493; *Snead* v. *Elmore*, 59 F. (2) 312, 314; *Paul Jones & Co.* v. *Lucas*, (D. C.) 33 F. (2) 907, 908. And details may be added on the suit. *Bass* v. *Hawley*, 62 F. (2) 721, 724. It also follows from the fact that a claim for refund is a condition precedent, that it must give notice of the nature of the claim for which suit is brought. *Felt & Tarrant Manufacturing Company* v. *United States, supra*. However, the suit is not confined to the "identical" grounds of the claim for refund. It is only necessary that the grounds of the suit and the grounds of the claim accord in essentials. *Lucas* v. *Fidelity and Columbia Trust Company*, 89 F. (2) 945, 947; *Snead* v. *Elmore, supra*.

A consideration of the function of a claim for refund as a condition precedent to a suit to recover

taxes fortifies and delineates the line of decision picked out by these cases. The function of a claim for refund is not to frame the exact bounds of contentions and evidence to be tested by an adversary proceeding. Its function is to invite[21] and facilitate[22], in the interest of a proper administration of the revenue[23], an ex parte investigation[24] by the Commissioner and his assistants of the grounds and facts supporting the rights asserted by claimants seeking to recover taxes, to the end that errors made in the administration of the revenue may be corrected without the necessity of litigation, and, if that is impossible, to aid the officials to prepare for the trial of the suit to recover taxes.[25] Necessarily, in view of its function, a claim for refund sufficiently accords with a suit to recover taxes if: (1) it adequately puts the Commissioner on notice of the fact of the claim and in general terms points to the factual basis; (2) it is reasonably calculated to initiate an investigation which would disclose the import of the amplified details of the grounds and facts set forth in the suit, or would have done so but for the fact that the Commissioner denied the claim for reasons other than the grounds and facts set out therein; (3) the difference between the claim and the suit in respect of the grounds and facts were not such as to occasion surprise on the part of the Government, thus materially impeding its defense on the trial of the suit; and (4) the differences are of detail and not of kind.

Although at the time the amended claim for refund was filed, no regulations of the Treasury Department specifying the requirements for claims for refund of these excise taxes were in effect (see n. 17, p. 9, *supra*) nevertheless,

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[21]*Snead* v. *Elmore*, *supra*, p. 314.

[22]*Tucker* v. *Alexander*, *supra*, p. 321.

[23]*United States* v. *Felt & Tarrant Company*, *supra*, p. 272.

[24]Cf. *United States* v. *Garbutt Oil Company*, 302 U. S. 528, 532-533; *United States* v. *Andrews*, 302 U. S. 517, 524.

[25]*Tucker* v. *Alexander*, *supra*, p. 231; *A. G. Reeves Steel Company* v. *Weiss*, 119 F. (2d) 472, 476.

since the purpose of a claim is notification to the Commissioner, and since the statute authorizes the Secretary and the Commissioner to prescribe the form and contents of such claims, their definition of the requirements of a valid claim is material here. Those requirements have long been established. In March, 1929, the Secretary by regulation said as to claims for income taxes:

> "The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof."[26]

Such has been the rule ever since.[27] Claims for excise taxes must be on Form 843 and the instructions on that form use this same language. Thus the rule for a valid claim is "each ground" and "sufficient facts to apprise the Commissioner".

The Claim for Refund in this Case Was Sufficient.

Petitioner submits that the claim for refund in the instant suit, under the rules discussed above, was sufficient as a condition precedent to its suit to recover.

The substantive ground for this suit was that Pacific overpaid its manufacturer's excise tax in a certain specified particular. Since the petitioner did not itself pay the tax, an additional, procedural, ground was that the petitioner owned the right to the refund. In its claim for refund petitioner said that it was the owner by reason of an assignment dated June 30, 1934. In its petition to the Court it asserted the same procedural ground and stated the same procedural fact, but added the further elaboration that the transaction of June 30, 1934, was a distribution in kind of all assets in a complete liquidation. So far as "ground" is concerned, the procedural ground was, and is, that petitioner is the owner of the right to the refund.

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[26]T. D. 4265, C. B. VIII-1, p. 110-1, March 27, 1929.

[27]Sec. 19.322-3 of Regs. 103; Art. 322-3 of Regs. 101, 94 and 86; Art. 1254 of Regs. 77 and 74.

Reference to the transaction of June 30, 1934, was a sufficient fact to apprize the Commissioner of the basis of the claim. The manner of acquiring title to the right is not the "ground" but is merely an explanatory factual description. When petitioner came to sue, it did not change the ground. It repeated that it was the owner of the right and became so by the transaction of June 30, 1934. Then it added the further legalistic elaboration, characterizing the transaction as a distribution of assets in kind upon a complete liquidation of the then owner.

The Commissioner was fairly put on notice of the nature of petitioner's claim; he was advised of both the substantive and procedural contentions involved. Any investigation of petitioner's asserted right to claim a refund would have concerned, first, the fact of the assignment, and, second, the authority of Pacific's President and Secretary to execute the assignment. The records showing this authority, namely, the resolutions of the directors and the stockholders, disclose the details constituting the sole differences between the claim and the First Amended Petition: that petitioner was the sole stockholder of Pacific and that the assignment was made as a distribution to it in kind of all of Pacific's claims and choses in action.

As a matter of fact the claims for refund and the instrument mentioned therein indicated on their faces that the transfer was a distribution in kind in liquidation. The transfer was of *all assets*, from Pacific Goodrich Rubber Co. to B. F. Goodrich Co., both companies having the same address and papers being signed by the same person as Secretary of both companies. Thus, the transaction of which notice was given in the claim for refund pointed unerringly to the details added on suit. The failure to set them forth did not in any way impede the Commissioner's consideration of the claim, for his consideration did not, as the letter of rejection (see p. 5, *supra*) shows, involve the procedural contention. Nor was the Government surprised at the trial. It readily stipulated that the pleading

containing the added details might be filed. Neither then nor later did it object on the ground of surprise.

It is true that a distribution of assets in kind is not ordinarily or in strict accuracy called an "assignment". But a distribution in kind involves instruments of transfer and such instruments may be called "assignments".[27a] The instrument of June 30, 1934, was called an "Assignment" (R. 191), although in fact it was an instrument effectuating a distribution in kind, as the slightest investigation would show. The claim for refund made reference to the precise instrument; the petition in Court described the whole transaction of which the instrument was the effectuating medium. The two referred in precise words to the same transaction; both were statements of the same "ground", namely the ownership of petitioner by virtue of the June 30, 1934, transaction. Admittedly the two were not "identical" because the instrument mentioned in one was only part of the whole transaction described in the other. The Court of Appeals held that the two must be "identical". Reduced to its ultimate, the holding of the Court in this respect was that if a person at one time says he acquired property by an assignment which was a distribution in kind upon a complete liquidation of a corporation, and at another time says he acquired the property by an assignment, he has made two different statements.

The rule for which we here contend has always been the rule of practice in the Treasury Department, and it must necessarily be the rule. The Department deals with millions of individual people. A major premise of its success is the confidence of these people in its fair dealing with them. They must believe, and it must be true, that if they overpay their tax they can recover the excess. If the process of recovery be hedged about with technicalities, so

[27a] A distribution in kind of its assets by a corporation to its stockholders, effectuated by an assignment, is sufficient to transfer the corporation's claims for refunding taxes, such a transfer not being rendered void by R. S. § 3447, *supra*. *Novo Trading Company* v. *Commissioner*, 113 F. (2) 320.

that the unadvised individual taxpayer can hardly be successful, a major blow has been struck at the collection of the revenue. Of course a claim for refund must reasonably apprize the Department of the nature of the claim and the facts upon which it is based. Otherwise administrative chaos would exist. But that is a far cry from the holding of the Court below in this case that a claim for refund must be identical in detail with any subsequent petition or complaint at law for the recovery of the tax. The rule which would follow from this holding of the Court below is that a claim for refund which lacks any essential of a valid petition at law is invalid. Such a rule would be disastrous in the administration of the tax law.

The Court will remember that this matter of variance was not originally raised by the Government. It was an idea of the District Court.

II.

Respondent, under the doctrine of Tucker v. Alexander, supra, waived the variance.

Petitioner has contended above that the Circuit Court of Appeals committed error in holding that petitioner's First Amended Petition varied fatally from its claim for refund. However, if this Court holds that there is such a variance, it is petitioner's contention that the holding of the Court below that respondent did not waive the variance is erroneous under the doctrine of *Tucker* v. *Alexander*, *supra*.

On the trial of that case, Tucker abandoned the grounds stated in his claims for refund and asserted a new one. The Government neither objected to the resulting variance nor in words waived it, but proceeded to meet the new ground with argument and evidence. Toward the end of the trial counsel for the Government and Tucker stipulated orally (see p. 26, *infra*) the amount to which Tucker would be entitled if the Court should find in his favor on the new ground urged at the trial. In view of the failure on the part of counsel for the Government to raise the

question of variance during the trial and of his entering into the stipulation, this Court held that the Government had waived the variance. However, the absence of a stipulation is not a distinguishing ground. It is sufficient grounds of waiver if the Government fails to raise properly the question of variance at the trial (*Howbert* v. *Penrose*, 38 F. (2) 577, 580); *Northwestern National Bank and Trust Co.* v. *United States*, 46 F. Supp. 381; *Hopkins* v. *Magruder*, 34 F. Supp. 381, 382-383, aff'd on other grounds, 122 F. (2) 693; *Beaverdale Memorial Park* v. *U. S.*, 47 F. Supp. 663) or if it acquiesces to an amendment giving rise to a variance (see *Snead* v. *Elmore*, *supra*, p. 313).

Counsel for the Government did not object to the filing of the First Amended Petition; in fact, he entered into a stipulation that it should be filed, and in doing so he raised no question of variance. Furthermore, he did not amend the Government's answer to raise a question of variance, but left it to stand as it was when under the pleadings of petitioner there could have been no grounds upon which to raise a question of variance.[28] Neither in his oral statement to the Court concerning the issue involved in the case, nor in the brief which he submitted to the trial Court for the Government, did he raise a question of variance.

Petitioner submits that the conduct of counsel for the Government in the instant case affords equally as clear a waiver of the variance as did the conduct of counsel for the Government in the *Alexander* case and the other cases

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[28] The Court below placed its holding that the Government did not waive the variance at the trial on the grounds that the point had been saved by the demurrer which the Government interposed to petitioner's original petition (see p. 6, *supra*. The variance however, arose only upon the filing of the First Amended Petition (see p. 7, *supra*). Since a demurrer only raises the sufficiency of the pleading to which it is directed, it is obvious that this holding of the Court below is erroneous. Furthermore, the demurrer did not assert insufficiency, on grounds of variance, but only, in so far as here material, on the ground that the assignment of June 30, 1934 was void under R. S. § 3477, *supra*.

cited, and that the Circuit Court of Appeals committed error in holding the contrary.

III.

Respondent could waive the variance.

In *Tucker* v. *Alexander, supra,* this court pointed out that, at the time of the trial of that case, the statute of limitations had not run against the claims for refunds with respect to the taxes in suit, and hence the waiver of the variance did not constitute a waiver of the statute of limitations on claims for refund, but only of the statute requiring that a claim for refund be filed with the Commissioner prior to the institution of suit. It is true that in the instant case the variance concerned arose after the statute of limitations (see n. 8, p. 4, *supra*) against claims for refund had run. However, petitioner submits that the difference does not control; that if there was a waiver in the instant case, it was a waiver of the statute requiring that a claim for refund be filed, and not a waiver of the statute of limitations against refunds.

Though the statute of limitations had run on new claims for refund in respect of the taxes which petitioner sought to recover, and though petitioner's claims had been rejected, they were still susceptible of proper amendment with the consent of the Commissioner. (*Pink* v. *United States,* 105 F. (2) 183, 187). An amendment, under such circumstances, is proper if the facts upon which it is based would have been ascertained by the Commissioner in determining the merits of the original claim (*ibid.*). The permission to file a proper amendment after the statute of limitations has run does not involve a waiver of the statute of limitations (*United States* v. *Memphis Cotton Oil Company,* 288 U. S. 62). Accordingly, if a variance consists of matter which, with the Commission's permission, could have been included in an amendment to a timely claim for refund, a waiver by the Government of a claimant's failure to submit the

subject matter of the variance to the Commissioner by proper amendment would not constitute a waiver of the statute of limitations against claims for refund, but, as in the case of *Tucker* v. *Alexander*, a waiver of the statutory requirement that the claim sued on be first submitted to the Commissioner.

It remains to show that the rule here contended for by petitioner has application to the facts of the instant case. This, in sum, resolves itself to showing that the subject matter of the so-called variance would have been ascertained by the Commissioner if he had investigated the merits of petitioner's claim that it was entitled to recover the taxes paid by Pacific by virtue of the latter's assignment of June 30, 1934. Petitioner submits that it is plain, as we have already said, that the first disclosure of such an investigation would have been the records showing the authority of Pacific's President and Secretary to execute the assignment, and that these records would have shown the subject matter of the alleged variance: that petitioner was the sole owner of Pacific's stock and that the assignment was a distribution in kind.

CONCLUSION.

There can be no dispute of the proposition that the Government collected from Pacific a tax to which it (the Government) was not entitled, and the District Court so held. There can be no question but that the present petitioner as the sole stockholder of Pacific was at all times the beneficial owner of the right to recover the taxes. It is not disputed that the present petitioner became owner of the legal title to the right to recover by reason of a distribution in kind of the assets of Pacific, implemented by an instrument called an assignment, dated June 30, 1934. There can be no doubt but that petitioner in a proper suit is entitled to recover the taxes paid. *Novo Trading Company* v. *Commissioner, supra.* The sole bar to recov-

ery suggested by the Court below is the fact that in its claim for refund petitioner mentioned the instrument of transfer and in its petition to the District Court described the whole transaction. Petitioner respectfully submits that the Court below was in error in its conclusion as to the necessity for absolute identity of detail between the claim for refund and the petition to recover in a consequent suit at law. Such holding is contradictory to the established rules and to the unbroken line of judicial authority as to the purpose, function and necessary content of the prerequisite claim.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

R. S. § 3226, as amended by Section 1103(a) of the Revenue Act of 1932, 47 Stat. 286, now 26 U. S. C. § 3772(a)(1), reads in pertinent part as follows:

> § 3772(a)(1).—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

R. S. § 3477, 31 U. S. C. § 203, reads in pertinent part as follows:

> § 203.—*Assignments of claims void.* All * * * assignments made of any claim upon the United States * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such * * * assignments * * * must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer. * * *.

Section 602(1) of the Revenue Act of 1932, 47 Stat. 261, 26 U. S. C. § 3400, reads as follows:

> Section 602.—There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:
>
> (1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

Section 16(a) of the Agricultural Adjustment Act of 1933, 48 Stat. 40, 7 U. S. C. § 616(a), provides in pertinent part as follows:

> § 616.—(a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:
>
> (1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. * * *

Stipulation In Tucker v. *Alexander*, 275 U. S. 228.

Mr. Toomey [Counsel for Government]:

> I think at this time we can simplify this case a little bit by making a stipulation here. It is stipulated that the value of the stock at March first, 1913, including the real estate and the dividends which were subsequently taken out based upon the net worth of the corporation was $356.86 per share. That is the figure used by the revenue agent. It is also agreed that if the Government is correct in reducing the March first value by the amount of this real estate and the dividends, that that valuation per share will be reduced $153.15, leaving a net March first value per share of $203.71. *I believe it is also agreed* that at the date of liquidation the assets of the corporation valued upon the same basis, the stock was worth $319.42 per share *that if the court should hold that the Government is wrong in its method of computing* the March first, 1913, value, hold we were wrong entirely, that *the plaintiff is entitled to judgment for $6,642.13*, the maximum of the recovery will be only $6.642.13. The correct means of treating the $216.26 will be reserved for the determination of the Court.

Mr. Garnett [Counsel for Tucker]:

It is understood that if the Government is wrong as counsel has stated to the handling of the dividends the amount refunded of taxes will be $6,642.13.

Mr. Toomey: *Yes, sir.*

Mr. Garnett: With interest from date of payment at six per cent and if the Court should hold that the refund of $216.26 which the Commissioner has announced in the letter the taxpayer is entitled to will not be included in the judgment, then that will be deducted from the total amount so refunded.

The plaintiff reserves and by this stipulation does not waive the question of whatever benefit he may have on goodwill value shown to have existed March first, 1913, and also existed at July 1920, but which the plaintiff contends is not distributable to the stockholders on liquidation. (See Record in No. 167, October Term 1927, pp. 64-65.) (Italics supplied)